In an action for recovery of the deposit paid under a contract of sale and purchase the court has a discretion as to whether or not to allow interest, and from what date it should be calculated. Where the non-completion is the fault of the vendor, and such fault existed at the date of the contract, as for example, not having any title, interest will be allowed from the date of payment as a rule. It is not difficult to cite an anthology of cases in support of this proposition. My choice of cases is as follows: *Macdonald* v *Marson*,[3] *Re Hargreaves & Thompson's Contract*,[4] *Turner* v *Marriott*[5] (good title not deduced); *Day* v *Singleton*[6] (vendor unable to procure lessor's consent to assignment of lease), *Carlish* v *Salt*[7] (vendor failing to disclose a party wall notice prior to contract), *Re Bryant & Barningham's Contract*[8] (trustees without an immediate power of sale), *Weston* v *Savage*[9] (title defective), *Skinner* v *James Syphonic Visible Measures Ltd*[10] and *Power* v *Atkins*[11] (misrepresentation by vendor).

However, if the circumstances warrant it, interest may be allowed only from the date of the purchaser's repudiation of the contract: *Moss* v *Perpetual Trustees and Agency Co.*[12]

Now, clearly, taking a wrong view of the law, even if reasonably held, constitutes a default: see *Re Bayley-Worthington and Cohen's Contract.*[13] So, perhaps, understandably in the present case, there was no dispute that non-completion was due to the fault of the defendant. But when did this fault first exist? The answer to this question must be when the defendant first became aware as a result of the opinion of their experts that the existing substructure was substantially not in accordance with the contractual specifications and could not therefore be retained without considerable risk to the proposed superstructure. It was agreed by counsel that the defendant had accepted the opinion of their experts most probably on 1 July 1983.

It is my view, therefore, that at the latest, this last mentioned date was the date when the defendant ought to have, but did not, write to the plaintiff inquiring if he was prepared to wait for the substructure to be completely demolished and a new one meeting design specifications reconstructed *or* if he wished to rescind the contract of sale and purchase and have a refund of the four payments he had made. But, it was not until 16 October 1984 that the defendant took this elementary step (see its letter ex L2 p 1 to encl 5). In these circumstances, the defendant was guilty of inordinate delay and so, to this extent, it was at fault.

I might add, in passing, that it is unnecessary to decide if the defendant had decided to abandon the project but, I note in passing, that in its defence, it had admitted that because of the defective substructure, the project could not be proceeded with and, indeed, to the present day – some nearly five years later – it appeared that no attempt has been made to do so.

I would accordingly, in the exercise of my discretion, award interest at the agreed rate of 8% pa on the aggregate of the four sums aforesaid from 1 July 1983 until date of judgment, and thereafter, pursuant to O 42 r 12 of the Rules of the High Court 1980, at the same rate, until realization.

There will, of course, also be judgment for the plaintiff for the return of the aggregate sums paid under the sale and purchase agreement, amounting to $183,900 and the costs of this application.

Finally, general damages suffered by the plaintiff (if any), as a consequence of the defendant's breach of the sale and purchase agreement, shall be determined by the senior assistant registrar of this court upon enquiry.

Order accordingly.

Solicitors: *Lim Kean Siew & Co*; *Allen & Gledhill.*

Reported by *Prof Ahmad Ibrahim*

Abdul Ghani bin Awang v Sheriliza bte Yusof

HIGH COURT (KUALA LUMPUR) – ORIGINATING SUMMONS NO FS6-2095-87
SITI NORMA YAAKOB J
28 APRIL 1988

Family Law – Custody of infant – Father and mother divorced – Infant staying with mother but maintained by father – Remarriage of mother – Mother intending to take infant to Hungary to live with her husband – Application by father for custody – Whether mother no longer a fit and proper person to have custody of infant in view of her remarriage – Paramount interest of infant

In this case, the applicant and the respondent had a child from their marriage. They were divorced when the infant was two years old and since then the infant had been staying with the respondent but the applicant paid maintenance for the support of the infant. The mother had remarried and intended to take the infant with her to Hungary where her French-born husband was posted. The applicant applied for custody of the infant who had attained 11 years of age. The man the respondent had remarried had been converted to Islam before the marriage.

Held, dismissing the application: (1) The only consideration the court has to bear in mind is whether the respondent is no longer a fit and proper person to have custody of the infant in view of her remarriage and whether custody to the applicant would be for the paramount interest of the infant.

(2) Since the respondent has been taking care of the infant ever since his birth and had uninterrupted custody of him for the past nine years, a change in custody would be too traumatic for the infant.

(3) Bearing all considerations, particularly the infant's wish that he would like to remain with his mother and that both the respondent and her husband were willing to pay for the infant's expenses to come to Malaysia to see the applicant at

least once a year, the court considered that in the best interest of the infant, custody should remain with the respondent and therefore the applicant's application was dismissed with costs.

Zaid Ibrahim for the applicant.
Haji Sulaiman Abdullah (Megat Nazirudin with him) for the respondent.

Cur Adv Vult

Siti Norma Yaakob J : The custody proceedings in this originating summons were initiated by the father of an 11-year-old boy, when he, the applicant father, was notified by his former wife, the respondent, that she intended to take the infant with her to Hungary where her French-born husband was posted.

As a first step towards gaining custody of the infant, the applicant on 3 July 1987 obtained an injunction ex parte restraining the respondent from taking the infant out of Malaysia.

The applicant married the respondent in London in 1975 and a year later the infant was born. Two years later, on 17 July 1978 they were divorced and as the infant was only two years old then, they mutually agreed that the respondent has custody of the only child of the marriage and custody had remained uninterrupted with the respondent until the present proceedings commenced.

Pursuant to the divorce, the Syariah Court also ordered the applicant to pay $150 per month towards the maintenance of the infant and in 1984, the applicant, on his own volition, increased the amount by another $150 and he has never failed to keep up with the monthly payments.

During the intervening years, the applicant had easy access to the infant and in 1984, when the infant was enrolled in a private school, the applicant contributed towards his school fees and arranged with the respondent to collect the infant in the morning, sent him to school and collect him again after school was over and saw to his safe return to the respondent. In all respects, the applicant was able to see his son almost every day.

In June 1987, however, this routine became disrupted when the respondent notified the applicant that she was planning to join her French-born husband in Budapest and intended to take the infant along with her and had already enrolled him at the American International School at Budapest. This brought a strong note of protest from the applicant as he felt that he should have been consulted first before the respondent had decided to take the infant out of Malaysia and he demanded that the respondent provide him with documentary proof of her remarriage, the status of her husband and his financial standing. Undoubtedly, the applicant was concerned as to the background of the respondent's new husband to whom the respondent has delegated the responsibility of seeing to the future upbringing of the infant.

The respondent took her time in divulging the personal particulars of her husband and this reluctance on her part must be due to the fact that in June of 1987, she was not yet married to him. She only married him on 12 August 1987, six days after he had become a Muslim convert and from the respondent's many affidavits, the following particulars of her husband were revealed.

He is a French citizen, attached to the French Ministry of French Affairs. He had served in Kuala Lumpur from 1979-80 teaching French at the Alliance Francaise and it was during this tour of duty in Malaysia that he met and befriended both the respondent and the infant. Although married, he was then separated from his wife for six years and has two grown up children, a boy aged 19 and a girl aged 16, with her. In 1981, he had his divorce finalized with custody of the two children granted to him and on 6 August 1987, he became a Muslim convert and married the respondent six days later. Presently he is posted in Budapest, Hungary as the General Delegate of the Alliance Francaise in Hungary and earning a net salary of $12,000 per month.

The applicant questioned the status of the respondent's remarriage, particularly in the light of non-compliance with certain provisions of the Muslim law relating to Muslim marriages in Selangor and to the sufficiency of the certificate certifying his conversion into Islam. I do not consider that objections on the validity or otherwise of either the respondent's second marriage or the conversion of her husband into the Islamic faith can be raised before any civil court for the very reason that the court has no jurisdiction to inquire into the validity of any Muslim marriage or matters pertaining to the Muslim religion. It suffices for me to say that on the face of the marriage certificate and the temporary certificate of conversion that a Muslim marriage had been conducted between the respondent and Iskandar Mehdi Stocker bin Abdullah, a Muslim convert, and I have to accept that both ceremonies were legally and lawfully conducted.

As with all cases of this nature, the only consideration I have to bear in mind is whether the respondent is no longer a fit and proper person to have custody of the infant in view of her remarriage and whether custody to the applicant would be for the paramount interest of the infant.

The applicant relied on his financial standing, the religious instructions the infant can continue to receive, the infant's education will not be interrupted if he is to remain in Malaysia and after having had custody of the infant for 11 years, it is only right and proper that the respondent relinquish custody of the infant to him.

As the deputy director of Comex (Malaysia) Sdn Bhd, a company dealing with off-shore and sub-sea engineering to the oil and gas industries in Malaysia, and earning an annual income of $50,000 with no other dependant except for the infant, the applicant maintains that he is in a better position than the respondent's husband to provide for the infant financially. Moreover, he has taken out three life insurance policies for the benefit of the infant to the value of $144,000 inclusive of hospitalization benefits. As he had not remarried, his house in Subang Jaya worth $160,000 and his EPF contributions will automatically pass to the infant, on his death.

I do not doubt that the applicant is in any way incapable of providing for his son financially but on the other hand the respondent's husband has also sworn an affidavit, confirming his willingness to provide for the infant's future and he appears to have a very comfortable income himself. He does not provide any alimony to his ex-wife, the education of his two children who are in France is free. He is covered by his social security scheme for all medical, dental and hospitalization charges and he would be entitled to a pension upon reaching 60 and which will revert to his wife on death. On the question as to who is in a better position to provide for the infant, I consider that both the applicant and the respondent's husband are equally capable.

At the hearing of the application, the respondent had already enrolled the infant at the American International School in Budapest but there is no knowing how long he can continue to study at that school as his step-father's tour of duty in Hungary ends in June 1988. With the uncertainty as to where he will be posted next, the applicant fears that the infant's education will be interrupted and this makes it more imperative that the infant continue to study in this country. The respondent's reply to this is that regardless of where her husband will be posted next, there are other international schools where the infant can be admitted to and interruptions in education are inevitable for families living abroad. To me what is more relevant is whether such disruptions will work against the best interests of the infant but if there is a firm committment to succeed, backed by a firm foundation, I do not see how such disruption can work against the infant.

Reports from the private school where he has been studying since 1984 show him to be above average in intelligence and my interview with him, though short, was sufficient for me to conclude that he is mature enough to realize that the present proceedings over his custody had become necessary as his father objects to him following his mother to Hungary to join his step-father with whom he has already formed an attachment. He had indicated his preference to be with his mother and step-father and since there is no evidence that the step-father will treat him anything less than his own children, I do not consider that the disruptions in the infant's education, if and when they take place, will be detrimental to the infant.

As a Muslim mother, I am sure that the respondent will not fail in her duties to teach her son all the basic Islamic values and Islam being such an international religion, I doubt that the respondent's family will be the only Muslim family in Budapest where the teachings of Islam will not be available to the infant. Just as the applicant harbours fears that the infant's religious knowledge will be in jeorpardy if he is taken to Budapest, the applicant must also show that he is the upright, sincere, devout Muslim that he makes himself out to be. Averments by the respondent in her affidavit that the applicant had failed to teach the infant the basic Islamic values and had, on two specific occasions, asked and eaten pork, remain unchallenged and unrebutted, and this does not speak too well of the applicant who now complains that the respondent will not be able to provide the infant with the basic Islamic values and knowledge.

The respondent has had custody of the infant for the past nine years, and by virtue of this, the applicant maintains that it is only right and proper that custody be transferred to him. Now what can the applicant offer the infant in the form of a family life? From my interview with the infant, I learnt the applicant lives alone in Subang Jaya and on the occasions the infant had spent nights with his father, the applicant would buy cooked food for the two of them as there is nobody in the house to cook for them. The applicant lives alone and despite his affirmation that the respondent's mother would look after the infant when he is at work, his former mother-in-law has vehemently denied she was prepared to do so particularly when the infant has his own mother willing and able to care for him.

Unlike the respondent, the applicant has never remarried and since he makes no mention of any close relative, the respondent also questioned his emotional stability in bringing up an 11-year-old child. There is evidence that he could not even get on with his own father and weighing all the pros and cons, I very much doubt that he can take on the responsibility of a single parent.

When comparing what the applicant can offer the infant and what the infant has been accustomed to, I consider that at least the respondent and her husband can offer some resemblance of a home life to the infant. It is not that the step-father is unknown to the infant. The latter has even written a composition about him in his final examination and he appears to have a high regard for him. Since the respondent has been taking care of the infant ever since his birth and had uninterrupted custody

of him for the past nine years, I had considered that a change in custody would be too traumatic for the infant.

Bearing all considerations, particularly the infant's wish that he would like to remain with his mother and that both the respondent and her husband are willing to pay for the infant's expenses to come to Malaysia to see the applicant at least once a year, I had considered that in the best interest of the infant, custody should continue to remain with the respondent and to that end, I had dismissed the applicant's application with cost. However, to ensure that the relationship of father and son is not forgotten altogether, I had also directed that the respondent, on her own expenses, sends the infant to Malaysia at least once a year to enable him to see the applicant and pending his departure to Budapest, the respondent is to give every opportunity for the infant to be with the applicant. Lastly, I also had the ex parte injunction vacated.

Order accordingly.

Solicitors: *Adnan Sundra & Low; Mutalib & Bakarudin.*

Reported by *Prof Ahmad Ibrahim*

Dusun Semenyih Sdn Bhd v Development & Commercial Bank Bhd

HIGH COURT (KUALA LUMPUR) – ORIGINATING SUMMONS NO S6-31-2848-87
SITI NORMA YAAKOB J
8 MARCH 1988

Land Law – Order for sale made by land administrator – Application to set aside – Whether lack of legal representation at inquiry before land administrator fatal – Whether claim by chargee for double interest fatal – National Land Code 1965, ss 262 & 263

Civil Procedure – Order of sale made by land administrator – Application to set aside – Application in the nature of an appeal – Whether application by way of originating summons proper – National Land Code 1965, s 418(1) & (2) – Rules of the High Court 1980, O 55 r 1

The plaintiffs applied by way of originating summons to set aside the order of sale made by the land administrator under s 263(1) of the National Land Code 1965. The plaintiffs alleged that the absence of legal representation at the inquiry before the land administrator had prejudiced their case and that it was improper for the defendants to claim for double interest, namely, 13.25% pa on the principal loan and 18% pa on the excess.

Held, dismissing the application: (1) The application of the plaintiffs was in the nature of an appeal under s 418(1) of the National Land Code 1965. Having regard to s 418(2) of the Code and O 55 r 1 of the Rules of the High Court 1980, the appeal should commence by way of an originating motion accompanied by the appeal records. As the plaintiffs had failed to comply with the mandatory provision of s 418(2) of the Code, their application was dismissed on this ground alone.

(2) Even assuming that the plaintiffs' application had been properly begun, there was nevertheless no merit disclosed in the plaintiffs' affidavits that warrants the setting aside of the order of sale made by the land administrator. The absence of the plaintiffs' solicitors at the inquiry had not prejudiced the plaintiffs' case in any way. Under s 262 of the Code, the only persons entitled to be heard were the chargor or chargee who were the plaintiffs and the defendants and since both were present, the land administrator had every right to proceed with the inquiry.

(3) Under the annexure to the charge, the defendants were entitled unilaterally to vary the rate of interest from time to time without notice. In accordance with the agreement, the plaintiffs were charged a higher rate for the excess as they had exceeded the use of the approved limit of the loan facility.

(4) As the plaintiffs had failed, even on the merits, to establish that the land administrator was wrong in making the order of sale under s 263(1) of the Code, the application was dismissed.

Legislation referred to
National Land Code 1965 ss 262, 263(1), 418(1), (2)
Rules of the High Court 1980 O 55 r 1

SA Ponmugam for the plaintiffs.
V Alahakone (Miss) for the defendants.

Cur Adv Vult

Siti Norma Yaakob J: In this originating summons, the plaintiffs seek to set aside the order of sale made by the district land administrator, Ulu Langat, pursuant to s 263(1) of the National Land Code on 23 July 1987. From the very nature of their prayer, it is an appeal under s 418(1) of the National Land Code which provides that 'any person or body aggrieved by any decision under this Act of the state director, the registrar or any land administrator, may at any time within the period of three months, beginning with the date on which it was communicated to him, appeal therefrom to the court'.

The form and procedure this appeal should take is further governed by s 418(2) of the National Land Code which provides that 'any such appeal shall be made in accordance with the provisions of any written law for the time being in force relating to civil procedure, and the court shall make such order thereon as it considers just'.

The written law now in force relating to civil procedure is the Rules of the High Court 1980, and the relevant order and rule is O 55 r 1 and that such an appeal should commence by way of an originating motion accompanied by the appeal records.

Clearly the plaintiffs had not taken heed of s 418(2) which is a mandatory provision and on their omission alone, I had dismissed this originating summons with costs.